

SOUTH AFRICA / JUDGMENT

SASOL Synfuels (Pty) Ltd v Commissioner Ceda N.O and Others (JR2006/18) [2022]

ZALCJHB 122 (23 May 2022)

[2022] ZALCJHB 122

COURT

Labour Court Johannesburg

BEFORE

FI Baloyi

CASE / FILE NUMBER

JR2006/18

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JR2006/18

In

the matter between:

SASOL
SYNFUELS (PTY)LTD
Applicant
and

COMMISSIONER:

THEMBA MICHAEL CEDA N.O First
Respondent
THE
NATIONAL BARGAINING COUNCIL
Second Respondent
FOR
CHEMICAL INDUSTRY
CEPPWAWU
obo GCINA MOFOKENG
Third Respondent

Heard:

07 JULY 2021

Delivered: In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 23 May 2022.

JUDGMENT

BALOYI, AJ

Introduction

[1] This is an application in terms of section 145(2) of the Labour Relations Act[1] (“the LRA), to review and set aside an award made by the First Respondent (the Commissioner).

[2] The Commissioner found that the dismissal of the individual Applicant (Mofokeng) was substantively unfair.

The evidence adduced

[3] The issue to be decided by the Commissioner was whether Mofokeng’s dismissal was substantively fair as procedural fairness was not in dispute.

[4] In order to assess the Commissioner’s findings, it necessary to consider the evidence adduced at the arbitration proceedings as well as the charge that Mofokeng was found guilty of and dismissed for.

[5] The charge read as follows:

“It is alleged that you contravened the Sasol Disciplinary Code for Employees, Rule 6.8 – Dereliction of duties due to negligence on or about the period between 13 September and 1 October 2016, in that you did not exercise proper care in performing your duties, which impacted integrity that resulted in serious implications for Power Stations”.

The Applicant’s case

[6] The Applicant’s first witness, Mr Hein Van Heerden (‘Van Heerden’), testified that he was the Area Manager responsible for maintenance on the plant. The plant is responsible for the purification of water. The water is purified so that it does not cause damage to the equipment which may endanger lives.

[7] Van Heerden testified that Mofokeng was employed as foremen for cold site of the plant. One of the main responsibilities of Mofokeng was maintenance of the pipeline and to ensure that there are no leakages on the pipeline.

- [8] Van Heerden testified that Mofokeng came back to work in June 2016 after he was suspended for misconduct however he was not found guilty of the alleged misconduct.
- [9] Mofokeng was tasked with the repair of a vessel after his return to work. Mofokeng had to ensure that the vessel's integrity is maintained. During this repair, Mofokeng had to fit or install a so called nozzle plate.
- [10] He testified that the nozzle plate is fitted in the wholes. The nozzle plate prevented sand from coming through as only water is required to come through. There is also welding and the vessel is painted so that water and carbon steel does not mix or get in contact with each other. After the nozzle plate has been fitted and the vessel has been painted, an inspector is asked to inspect and verify if everything has been correctly done.
- [11] Van Heerden testified that the vessel was then commissioned (put on operation). During the weekend of 21 August 2016, there was a sign of leakage on the nozzle plate as sand was detected.
- [12] On 13 August 2016 and because of the leakage, the vessel was de-commissioned (to put off). There was then an investigation as to why there was sand. The investigation revealed that three nozzles were broken and that is where the sand came from. According to the investigation, the paint was removed and was tampered with.
- [13] He testified that all the nozzles were removed, around 709 nozzles were removed. There was tampering with the paint. The vessel had to be sandblasted and repainted again.
- [14] He testified that the paint was tampered with after the inspector had conducted the inspection. The tampering is done either by the use of sandpaper or with a pencil grinder. Van Heerden was not sure as to whether sandpaper or grinder was use to remove the paint.
- [15] He testified that Mofokeng took responsibility for the first incident Van Heerden spoke to Mofokeng about it.
- [16] On the second incident, the vessel was sandblasted and repainted on the weekend of the 25 September 2016 and the inspector cleared the paint that afternoon.
- [17] Mofokeng was at work on 25 September 2016. Mofokeng and people from GBM who were helping Mofokeng clean the nozzle had tempered with the paint. They were removing the paint with a pencil grinder.
- [18] Mofokeng did not call the inspector after removing the paint to re-inspect and to determine if the thickness of the paint is still fine. Only the inspector can clear the paint. Instead, Mofokeng and his team installed the nozzles throughout the night. The nozzles were installed in the nozzle plate where the paint was removed.
- [19] On 26 September 2016, Mofokeng sent a message to Van Heerden saying the nozzle has been installed. Van Heerden did his own inspection and discovered that 10% of the nozzles hole were still left and were too small to fit in the paint.

- [20] Van Heerden instructed the artisan to remove all the nozzles already installed in order to determine whether the paint had been tampered with. The paint was tampered with.
- [21] Van Heerden testified that they had to sandblast the vessel and repaint it again. He was told by the supervisor of GBM Vincent Ngqoco that Mofokeng instructed that the paint be removed.
- [22] Van Heerden testified that once the inspector approves the paint, it is not allowed to tamper with the paint, unless the inspector comes back and re-confirms that it still up to standard. Mofokeng was well aware of the procedure.
- [23] Van Heerden could not remember the discussion he had with Mofokeng after this incident or regarding the incident.
- [24] In cross-examination, Van Heerden conceded that that Mofokeng was not charged with gross negligence and that usually for the first offence of negligence is a warning and for the second offence the sanction is a written warning.
- [25] He testified that Mofokeng was between the period 13 September to October 2016 expected to redo the plate, get it sandblasted, repainted, inspected and approved and the nozzles installed.
- [26] Van Heerden conceded that Mofokeng returned the vessel to its original state on 1 October 2016 and the reason why Mofokeng was charged was because there were certain build up events. There was deceit on the part of Mofokeng. In particular, Mofokeng deceived Van Heerden with the message that the nozzles were 90% installed.
- [27] He became aware of the misconduct on 26 September and Mofokeng was only charged on 23 November 2016, two months later.
- [28] He testified that Mofokeng called the inspector on 25 September 2016. When questioned on whether there was a report by the inspector, Van Heerden replied that there was a report but is not part of the bundle.
- [29] It was put to Van Heerden that Mofokeng's version was that the inspector did not inspect on 25 September
2016. Van Heerden replied that if the inspector had not come then the misconduct is gross because you cannot install the nozzles before the paint has been inspected.
- [30] Van Heerden testified that Mofokeng was working night shift on 25 September 2016 and he reported for duty in the afternoon and the inspector did the inspection the very same afternoon. However, he was not sure if Mofokeng was there when the inspection was done.

- [31] It was put to van Heerden that Mofokeng will testify that the inspector did not come on 25 September 2016 because they were still working. Further that Mofokeng was called to work night shift because there was a problem with electricity that was tripping and that is why they managed to do 90% of the work as per the SMS that was sent to van Heerden. Van Heerden conceded that there was no inspection on 25 September 2016.
- [32] The second witness for the Applicant was Meyer. Meyer testified during cross-examination that Mofokeng was charged with negligence for the work done during the period 13 September and 1 October 2016, in that he failed to follow proper procedure when he restored the vessel integrity. Mofokeng proceeded to fit nozzles without final clearance from the inspector.
- [33] Meyer accepted that there was visual inspection on the vessel on 25 September 2016 and that the inspector was not on site on 25 September 2016.
- [34] He testified that the nozzles were boxed up on 25 September 2016 by Mofokeng with the help of GBM artisans. He testified that there were 1000 nozzles in the vessel and if Mofokeng completed the work at 90% it means he had installed 900 nozzles. He further testified that you do not install 900 nozzles with the intention to remove them again. He testified that to install and to box-up is the same thing. He disputed the version put to him that Mofokeng installed the nozzles temporarily and did not box-up.
- [35] He conceded that there was dishonesty on the part of the inspector in that he backdated the documents. He conceded that the inspector was not on site on 25 September 2016 and the inspector was not truthful in his evidence.
- [36] He conceded that he did not interview Mofokeng and the inspector before preparing the charge against Mofokeng, he only interviewed van Heerden. He testified that he had a fairly good relationship with Mofokeng and that Mofokeng and van Heerden had difficulties working together.
- [37] The third witness for the Applicant was Mbulelo Ngkongko (Ngkongko). He testified that he is employed as supervisor by GDM (sandblasting and painting). GDM provide services to the Applicant.
- [38] He confirmed having made the statement on 20 October 2016. He admitted having called Mofokeng asking him 'what the boss wanted from him.' He testified that van Heerden called him and asked him about the work they did with Mofokeng.
- [39] He testified that van Heerden came with a statement and instructed him to sign. The statement was different from the statement that contained the sequence of events, two paragraphs were added to the statement.
- [40] He testified that the Sasol inspector's name was Goodboy. He testified that he knows Tebogo Motisibi. He testified that Mofokeng was given three artisans to assist him with the fitting of the nozzles.

- [41] In cross-examination Ngkongko testified that van Heerden was the one who suggested that changes be made in his statement. Further that he was not there when van Heerden went to inspect the vessel.
- [42] He testified that the nozzles were not boxed up and they were old nozzles and not new and further that his team from GDM are not qualified to box up. He testified that the box up happened after Monday. He confirmed that there was a problem of light and they could not use the pencil grinder on 26 September.

The Respondent's case (Mofokeng)

- [43] Mofokeng testified that he was employed by Sasol as a mechanical foreman. He was employed in September 2005.
- [44] He testified that there was no inspection of the vessel on 25 September 2016 and that Matsibi did not conduct the inspection as the record indicated as he was not at work.
- [45] He testified that on 25 September, the work that has to be done was to paint the vessel and to also install the nozzles (to fit). This work has been going on for the past five days.
- [46] He reported for duty at 16:00 on the 25 September 2016 and knocked off at 04:00 in the morning. He was being assisted by the team from GBM.
- [47] He testified that the team from GBM is not qualified to do the box up. To boxup nozzles you need a qualified artisan. The GBM team did the painting and polishing. He cannot box up nozzles alone and his duty is not to box up. The artisans were not on duty on 25 September 2019.
- [48] He testified that box up happens once GBM and Sasol has declared that the paint has been sparked and it does not make noise. An inspector must declare that the vessel is ready for box up. From GBM he was communicating with Ngqogco the supervisor.
- [49] The SMS that he sent on 25 September 2016 was directed to Grieves Mapota with van Heerden copied therein. The SMS was meant to tell Mapota the nozzles were installed 90% (the fitment).
- [50] He testified that van Heerden did not talk to him about his concern over the nozzles as set out in van Heerden's SMS. He became aware of the concerns on 23 November 2016 when he was charged. Even Meyer did not mention anything about the nozzles until he was charged in November 2016.
- [51] He testified that the nozzles that were installed on the 25 September were old and he did not have new nozzles. You need four artisans to box up because the vessel had 1009 holes.
- [52] In cross-examination, Mofokeng testified that at the time of dismissal on 10 March 2017 he had been a foreman for about nine years and he had at least 8 artisans reporting to him.

- [53] Mofokeng conceded that as a foreman he had the responsibility to maintain the integrity of the vessel however his role was coordination as there are other role players.
- [54] Mofokeng conceded that the vessel was painted by GBM and it conducted a spark test on the vessel. He conceded that the paint became thick and he further instructed that the paint be adjusted or be reduced in order for the nozzles to fit.
- [55] It was put to Mofokeng that after adjusting the paint, he failed to call the inspector, to which he replied that the work was on going. Mofokeng disagreed that the SMS was stating that the nozzles has been boxed up. According to him he fitted the nozzles and it was not a permanent installation. The nozzles were boxed up on 28 September which was a Wednesday.

Analysis

of the arbitrator's finding and the grounds for review

The test on review

- [56] I have to deal with the grounds for review within the context of the test this Court must apply in deciding whether the arbitrators's decision is reviewable. The test has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2] as that whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

- [57] The Labour Appeal Court (LAC) in *Gold fields Mining SA(Pty) Ltd (Kloof Gold Mine) v CCMA*[3] affirmed the test to be applied in review proceedings and held that:

'In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable'.

- [58] The applicant in a review application is not to take a microscopic view and dissect every finding of the arbitrator, but has to show that holistically, the award is unreasonable in that the arbitrator's finding led to an unreasonable outcome.

- [59] In *Bestel v Astral Operations Ltd and Others*[4] the LAC considered the limited scope possessed by this Court to review an arbitration award and held that:

'... the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whether this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected'.

- [60] In considering the Applicant's grounds for review, the Court should not lose sight of the limited scope within which a review application is to be decided.
- [61] In this case, Mofokeng was charged with one count of misconduct as set out above. To prove its case, the Applicant called four witnesses. The main issue in this matter revolved on whether there was an inspection conducted by the Applicant on 25 September 2016 and whether Mofokeng had boxed in the nozzles before the inspection.
- [62] The Applicant's case is that by 25 September 2016 the vessel had been painted and Matsibe had done his inspection. Furthermore, Mofokeng was not supposed to alter the work as Matsibe had done the inspection or Mofokeng should have called Matsibe again to finally inspect the work before permanently installing the nozzles.
- [63] The undisputed evidence in this matter is that Matsibe was not at work on 25 September 2016. Therefor Matsibe could not have inspected the vessel as contended by the Applicant's witnesses.
- [64] Van Heerden admitted that Matsibe was not on site on 25 September 2016. Meyer, the witness of the Applicant also admitted that Matsibe was not on site on 25 September 2016.
- [65] Mofokeng's version was that on 25 September there was no inspection, he and the GDM team were still busy with the painting. He fitted the nozzles temporarily and he called the inspector on 27 September 2016.
- [66] Mofokeng's evidence is corroborated by the testimony of Ngqogco (the supervisor from GDM). Ngqogco testified that the nozzles were not boxed up and that they were old nozzles.
- [67] In my view and considering the evidence presented before the Commissioner it is clear that Matsibe did not do the inspection on 25 September 2016 as contended by the Applicant. It follows that Mofokeng's contention which is supported Ngqogco that he did not box up the nozzles is correct. The evidence of Ngqogco and Mofokeng that they used old nozzles was not challenged by the Applicant. Furthermore, the evidence that the GBM team was not qualified to do the box up was not disputed by the Applicant. Accordingly, Mofokeng could not have boxed up the nozzles on his own at night.
- [68] It cannot be correct, as contended by the Applicant's witness, that Mofokeng altered the work that was inspected by Matsibe.
- [69] The primary task of a commissioner confronted by a material factual dispute is to determine the underlying probabilities. The court must deal with mutually destructive versions by weighing the evidence tendered by the parties and by applying the probability test and if necessary, to take into account the credibility of the witnesses.

[70] It was incumbent on the Applicant at the arbitration hearing to satisfy the commissioner that its version is true and therefore acceptable, and that the version advanced by Mofokeng was false and fell to be rejected. The employer has failed to rebut the evidence of Mofokeng.

[71] The commissioner is obliged to weight up and consider where probabilities fall and determine where the truth probably lies.[5]

[72] Given the evidence that was presented before the Commissioner, in my view, it was not unreasonable for him to conclude that van Heerden was an unreliable witness.

[73] In the results, the following order is made:

Order

1. The application to review is dismissed.
2. There is no order as to costs.

FI Baloyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr P Kirstein

Instructed by:

Johanette Rheeder Inc

For the Respondent: Mr Makhuru

Instructed by:

Cheadle Thompson & Haysom Inc

[1] No. 66 of 1995, as amended.

[2]

(2007) 28 ILJ 2405 (CC) at para 110.

[3]

(2014) 35 ILC 943 (LAC).

[4]

[2011] 2 BLLR 129 (LAC) at para 18

[5] See: National Employers Insurance Co v Jagers 1984 (4) SA 437 (A), Myburgh and Bosch Reviews in the Labour Courts at p. 262-4

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